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No. 89-1490

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EVELYN MARINO, et. al,

Petitioners,

-against-

JUAN U. ORTIZ, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 23, 1990
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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court change its long-standing rule that a litigant may not reopen a civil case after it has been litigated to a conclusion because of a subsequent change in law?

CORRECTED PARTY NAMES

The current Personnel Director of the City of New York is Douglas White. The current Police Commissioner of the City of New York is Lee Brown.

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STATEMENT OF THE CASE

This Court decided the underlying issues presented in this petition in Marino v. Ortiz, 484 U.S. 301 (1988) (per curiam). In Marino, an equally divided Court affirmed the Second Circuit's decision in Marino v. Ortiz, 806 F.2d 1144 (1986), which upheld the dismissal of petitioners' complaint. Petitioners had alleged that the settlement of

a Title VII lawsuit discriminated against them. The complaint was dismissed as an impermissible collateral attack on a consent decree.

In Martin v. Wilks, _ U.S._, 109 S.Ct. 2180 (1989), this Court held that collateral attacks on Title VII consent decrees were permissible. Petitioners filed a motion for an extension of time to reargue based on Martin in the Second Circuit Court of Appeals in June 1989. The Court of Appeals unanimously denied the motion by decision issued October 18, 1989. Marino v. Ortiz, 888 F.2d 12 (2d Cir. 1989). The instant petition seeks review of the Second Circuit's denial of petitioners' motion for an extension of time to file a motion for rehearing.

In its decision the Court of Appeals explained that it had only issued motions for an extension of time to petition for rehearing

based on a change of law when the law had changed while the appeal was still pending:

> Although we have occasionally granted extensions of time under Rule 40 after the mandate has issued, see, e.g., Davis v. Smith, 607 F.2d 535, 540 (2d Cir. 1978), we have done so only in circumstances far more compelling than those presented here. In Davis, for example, we granted an extension of time to petition for rehearing based on the Supreme Court's decision in Quern v. Mandley, 436 U.S. 725 (1978), which had been rendered before the panel decision in Davis. Thus, the extension of time in Davis was predicated on a mistake of law at the time of the original decision. See also, Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (per curiam); United States v. Middlebrooks, 624 F.2d 36, 37 (5th Cir. 1980) (per curiam).

888 F.2d at 12.

Because petitioners had litigated their case to a conclusion, the Court saw no ground to exercise its discretion to grant the petition.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DENIAL OF THE MOTION FOR AN ENLARGEMENT OF TIME TO PETITION FOR REHEARING WAS PROPERLY BASED ON THIS COURT'S RULE THAT A MATTER THAT HAS ALREADY BEEN LITIGATED TO A CONCLUSION MAY NOT BE REOPENED BASED ON A SUBSEQUENT CHANGE IN LAW.

This Court has long held that matters that have been litigated to a conclusion may not be relitigated based on a subsequent change in the law. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948); Huddleston v. Dwyer, 322 U.S. 232, 236 (1944): "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." Sunnen, 333 U.S. at 598.

Petitioners sought to reargue the decision in Marino based on this Court's

subsequent decision, Martin v. Wilks, 109 S.Ct. 2180 (1989), which changed the law that was applied in Marino. But since Marino had already been litigated to a conclusion, the Marino petitioners could not reopen the Marino issues based on the change in law. The res judicata effect of "a final, unappealed judgment on the merits [is not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Moitie, 452 U.S. at 398. See also 1B Moore's Federal Practice ¶0.415 at 512. But see State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 162 (1945) (stating, in dicta, that res judicata is inapplicable when there is a subsequent change in law).

When the law changes while a case is still sub judice, an appellate court must apply the law as it exists at the time the court considers the case. Huddleston, 322

U.S. at 236; Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 542-43 (1941). This rule has been applied to allow a petition for rehearing, in light of a change in law, of cases where a petition for certiorari was pending at the time the rehearing was sought. E.g. Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied, 400 U.S. 829 (1970). This case, however, was not sub judice at the time this Court decided Martin. To the contrary, this Court had issued a final judgment, affirming the Court of Appeals, and the Court of Appeals had affirmed the District Court's dismissal of petitioners' complaint. Petitioners' litigation had ended.

While petitioners suggest that the Marino decision is somehow infirm because it was decided by an equally divided Court, the decision bound petitioners "as if rendered upon the concurrence of all the

judges upon every question involved in the case." Durant v. Essex Co. 7 Wall 107, 113 (1868). Thus, petitioners could not reopen the questions decided by this Court in Marino and the Court of Appeals properly denied the petition for an extension of time to file a petition for rehearing.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 23, 1990.

Respectfully submitted,

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